No. 97-1756

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In The

Supreme Court of the United States

October Term, 1997

JEFFREY KENDALL,

Petitioner,

v.

BARBARA KENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of The Commonwealth Of Massachusetts

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENT'S OPPOSITION BRIEF IS RIDDLED WITH MISCHARACTERIZATIONS OF THE RECORD FACTS.

Respondent's opposition brief ("Opposition" or "Opp.") contains numerous misleading characterizations of the facts and distortions of the record, only a few of which can be addressed here. Most egregiously, Respondent seeks to characterize this dispute as stemming from "each" party's desire "to raise their three children according to their religious beliefs." (Opp. at 2.) In fact, it is only the Respondent, Barbara Kendall ("Barbara"), who seeks exclusively to impose her religious beliefs on the children. Petitioner Jeffrey Kendall ("Jeffrey") seeks merely to be able to continue to *expose* his children – the offspring of an interfaith union – to Christianity as well as Judaism. Barbara has vigorously opposed that effort.

Respondent also describes the Kendall home as an Orthodox Jewish household (Opp. at 6) and then asserts, falsely, that Jeffrey "objected to the children celebrating the Sabbath" (Opp. at 8). In fact, the record is clear that since 1991, Barbara and Jeffrey's children were exposed to both Christianity and Reform Judaism and suffered no apparent ill effects. The Probate Court found that Jeffrey "knows the Hebrew Prayers for wine, bread and light and sang them regularly with his family at Friday night dinners" between 1992 and 1994 – three years *after* he joined the Boston Church of Christ. (App. 34.) It is also undisputed that during the marriage Jeffrey regularly brought the children to Christian Sunday services, even as they were being raised as Reform Jews. (App. 102-103.) Respondent asserts – falsely – that "the Petitioner has expressed to the children that the Respondent will go to hell if she does not convert to the beliefs of the Boston Church of Christ." (Opp. at 8.) Nothing in the record or in the findings of any court below supports this false accusation. Jeffrey never told his children that their mother would go to hell.

Respondent further distorts the nature of the understanding between Barbara and Jeffrey regarding the religious upbringing of their children. Although they shared an understanding that they would raise their children in the Reform Jewish tradition,[1] and even sent the children to Jewish day school in exchange for financial support from Barbara's mother, Barbara and Jeffrey never discussed rearing the children as *Orthodox* Jews, whose beliefs and practices differ in many significant respects from those of Reform Jews. Moreover, Jeffrey never agreed to preclude his children from all exposure to Christianity.

Respondent's Opposition reveals, often quite candidly, that the judgment below was based, impermissibly, on negative and distorted images of Jeffrey's Christian religious *beliefs*, rather than his religious practices or conduct. Moreover, the courts below failed to distinguish between signs of emotional distress caused by the parents' bitterly contested divorce, and distress caused by exposure to the teachings of Jeffrey's church – teachings to which they were exposed well before the supposed distress first surfaced. Respondent distorts the record by repeatedly asserting that all three children suffered "physical and emotional harm as a result of their exposure to the Petitioner's *religious teachings.*" (Opp. at 17 (emphasis added), 20, 21.) These allegations grossly exaggerate the guardian ad litem's actual "findings" of very minimal (if any) harm – findings adopted wholesale by the Probate Court[2] – which were based on supposed emotional (rather than physical) harm that the eldest child, Ari (age 7 at the time of trial), suffered as a result of his parents' conflict. (App. 122.) The guardian ad litem concluded that Moriah (age 5) "is experiencing emotional distress *related to the parental conflict and separation,*" and not to the father's religious

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[1] The Massachusetts Supreme Judicial Court noted that such predivorce agreements generally are unconstitutionally unenforceable. (App. 3 n.5.)

[2] The Probate Court judge herself never met with, interviewed, or examined the children.

beliefs. (App. 123.) There was no finding that the youngest child – 3-year-old Rebekah – suffered any distress. Nonetheless, the Probate Court severely restricted Jeffrey's interactions with her as well.

Three pages of the Opposition are devoted to the highly speculative findings of the guardian ad litem, a non-lawyer, rather than to any findings of the Probate Court or Massachusetts Supreme Judicial Court.[3] (Opp. at 9-11.) Respondent summarizes, for example, the following passage from Dr. Goldberg's GAL report, which piles conjecture upon conjecture:

> *If* the children develop a negative view of [their mother] or reject her beliefs they *may* suffer hostility and rejection from [their mother]. *If* this were to occur the children *may* resent [their father] for undermining their relationship with [their mother]. Thus, the children *would not* have good relationships with either parent.

(Opp. at 11 (emphasis supplied).) Incredibly, Respondent states that the findings of the GAL were "[b]ased on these *facts*." (*Id.* (emphasis supplied).) These are not facts at all, but mere speculation. Such conjecture does not constitute a clear, affirmative showing of actual harm "so substantial as to warrant a limitation on the [father's] religious freedom" (App. 8). *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

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[3] Respondent asserts, without factual support, that the guardian ad litem, Michael Goldberg, is "a well respected psychiatrist specifically experienced in the area of inter-religious conflict." This claim is not supported by the record.

II. THIS COURT MUST INDEPENDENTLY REVIEW THE FACTS ON APPEAL BECAUSE THIS CASE IMPLICATES PETITIONER'S FIRST AMENDMENT RIGHTS TO FREEDOM OF RELIGION.

A. Independent Appellate Review is the Proper Standard.

Respondent asserts that independent appellate review is required "only in cases implicating restrictions on the freedom of speech protected by the First Amendment. . . ." (Opp. at 15.) This is indeed such a case. As this Court has noted, religious worship and discussion are "forms of speech and association protected by the First Amendment." *Wallace v. Jaffree*, 472 U.S. 38, 50 n.35 (1985), *quoting Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

Moreover, Respondent's suggestion that some constitutional rights are more deserving of protection than others is without legal foundation. This Court has applied searching appellate review to a broad range of cases implicating a wide range of constitutional rights, including: coerced confessions, double jeopardy, waiver of federal rights, probable cause determinations, Commerce Clause protections, and full faith and credit. (*See* Petition for Writ of Certiorari, at 9-10 (citing cases).) This Court also has cited with approval the Third Circuit's application of constitutional fact review in a case involving both the free speech and establishment clauses of the First Amendment. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 540 n.3 (1986). The same standard should be applied to this case implicating First Amendment rights to freedom of religion.

B. Application of the Independent Review Standard Compels This Court to Reverse the Massachusetts Courts' Rulings.

The Massachusetts Supreme Judicial Court acknowledged that the facts of this case involve "mixed questions of fact and law" (App. 7). It noted that *"whether the harm found to exist amounts to the 'substantial harm' required to justify*

interference with the defendant's liberty interest is a close question" (App. 15) (emphasis supplied). In such circumstances, the relevant legal standard – harm to children "so substantial as to warrant a limitation on the defendant's religious freedom" (App. 8) and "clear evidence of substantial harm" (App. 9) – "can be given meaning only through its application to the particular circumstances of a case," and therefore independent fact review is required. *Miller v. Fenton*, 474 U.S. 104, 114-116 (1985).

Had the Supreme Judicial Court reviewed the record *independently* of the Probate Court's findings, as the Petitioner urged the court to do (App. 61-73), it would have ascertained that the only evidence of "harm" to the children, other than their distress over the parental conflict and divorce (App. 122-123), were two isolated incidents involving only the oldest child, Ari: (i) Jeffrey's passing threat to cut the fringes off his son's vest, or *tzitzit*, if Ari did not tuck them inside his pants (it is undisputed that Jeffrey immediately changed his mind and apologized to his son for the request), and (ii) Jeffrey's agreement, at Ari's request, to cut Ari's hair. (App. 35.) Based on these two isolated incidents, the Probate Court constitutionally could have fashioned a narrowly tailored order prohibiting Jeffrey from restricting Ari's wearing of *payes* (religiously significant sideburns) or *tzitzit*, or even from restricting the boy's observance of other Orthodox Jewish practices. Instead, the court sweepingly denied Jeffrey's religious and parental liberties. Had it applied independent appellate review, the Supreme Judicial Court would have seen that there was insufficient evidence of substantial harm to the children to justify the substantial curtailment of the father's First Amendment rights to freedom of speech, religion, and association. *Wisconsin v. Yoder*, 406 U.S. at 230; *Felton v. Felton*, 383 Mass. 232, 233 (1981).

C. This Court has Jurisdiction to Exercise Independent Appellate Review.

The Massachusetts Supreme Judicial Court heard this case on direct appellate review from the Probate Court. Petitioner thus questioned the Supreme Judicial Court's reliance on an improper standard of review at the first possible opportunity, that is, in his petition for rehearing.[4] (App. 61-73.) *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930) ("The additional federal claim thus made was timely, since it was raised at the first opportunity."); *Herndon v. State of Georgia*, 295 U.S. 441, 444 (1935) (same).[5] The Supreme Judicial Court considered Petitioner's claim for independent appellate review – the only issue raised on review – and denied it. (App. 60.)[6] Because Petitioner squarely raised the issue of independent appellate review in a manner that was timely under both the Massachusetts procedural rules and Supreme Court precedent, this Court has jurisdiction to decide this issue.

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[4] The Massachusetts Rules of Appellate Procedure, unlike the Federal Rules of Appellate Procedure, do *not* require appellants to include a statement of the applicable standard of review.

[5] Respondent's reliance on *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) is misplaced. The issue in *Rotary* was whether appellants had timely raised their argument that a statute was unconstitutionally vague and overbroad. That was a substantive argument that the petitioners were required to raise in the case in main. Here, in contrast, the issue is the proper standard of review by the Supreme Judicial Court, an issue which could only arise – and which Petitioner immediately addressed – *after* the Supreme Judicial Court issued its opinion.

[6] Respondent misstates Massachusetts Rule of Appellate Procedure 16, which does not automatically "deem waived" all legal issues not presented in a brief (Opp. at 13). Rather, Rule 16 provides that the "court need not" – but may – "pass upon questions or issues not argued in the brief." Mass. R. App. P. 16. Moreover, Massachusetts Rule of Appellate Procedure 27 expressly permits a litigant to raise "points of law or fact which it is contended the court has overlooked or misapprehended."

III. THE OPINION BELOW IS INCONSISTENT WITH RULINGS BY OTHER STATE COURTS OF LAST RESORT.

A. The Ruling Below Fails to Make a Finding of "Substantial Harm" Sufficient to Justify Restrictions on Petitioner's Constitutional Rights.

Although Respondent asserts that the decision of the Massachusetts Supreme Judicial Court is consistent with the decision of other state courts, her claim is contradicted by the very cases that she cites. In the vast majority of decisions noted in the Opposition, state courts held that a trial judge may *not* enjoin a parent from exposing his or her children to that parent's religious beliefs.[7] In the only two cases cited by

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[7] *See, e.g., Chandler v. Bishop*, 702 A.2d 813, 817 (N.H. 1997) (vacating religious restrictions on father's visitation rights); *Osteraas v. Osteraas*, 124 Idaho 350, 356 (1993) (reversing trial court decision to remove physical custody from mother based on her lack of religious affiliation); *Kirchner v. Caughey*, 606 A.2d 257, 260-261 (Md. 1992) (vacating order prohibiting father from having child participate in any church or church-related activity while in his custody); *Pater v. Pater*, 588 N.E.2d 794, 800 (Ohio 1992) (reversing judgment that subjected mother's visitation to restriction that mother not teach or expose child to her religion); *Felton v. Felton*, 383 Mass. at 234 (reversing trial court order forbidding visitation unless father refrained from instructing children in his religion); *Harris v. Harris*, 343 So.2d 762, 764 (Miss. 1977) (reversing restrictions on mother whose religious practices included snake-handling, so long as children were not exposed to physical danger); *In re Green*, 448 Pa. 338, 348-50 (1972) (reversing trial court because state does not have a sufficient interest outweighing parent's religious beliefs precluding medical treatment when child's life is not immediately imperiled); *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971) (holding that courts should not disqualify any applicant from "visitation rights [or] from taking the children to a particular church, except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child"); *Waites v. Waites*, 567 S.W.2d 326, 333 (Mo. 1978) (reversing custody award to father impermissibly based on fact that mother was a member of Jehovah's Witnesses religion); *Welker v. Welker*, 129 N.W.2d

Respondent in which courts upheld restrictions on religious practices, the courts found an affirmative and substantial showing of harm to the children *and* cited applicable state statutes giving the custodial parent the exclusive right to determine the religious upbringing of the child.[8] (Massachusetts has no such statute.) Nothing in the record of this case constitutes a "clear and affirmative" showing of harm to the Kendall children based on their exposure to Jeffrey's religious beliefs. The courts below adopted wholesale the legal recommendations of the guardian ad litem (a non-lawyer), which, in turn, were based primarily on the children's understandable distress over their parents' conflict and divorce – *not* on a finding of distress caused by exposure to the father's religious beliefs. (App. 122-123.)

The GAL's speculative projections of harm are inadequate to meet the constitutional requirement of substantial harm sufficient to warrant the limitations imposed on Jeffrey's constitutionally protected "liberty interest in educating his children in the tenets of his religion." (App. 7.) *See Wisconsin v. Yoder*, 406 U.S. at 230; *Felton*, 383 Mass. at 233; *Zummo v. Zummo*, 394 Pa. Super. Ct. 30, 47 (1990).

B. The Ruling Below Violates the Establishment Clause of the First Amendment.

Respondent contends that "the order also does not foster excessive government entanglement by simply allowing any

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134, 138-39 (Wis. 1964) (reversing custody award to father impermissibly based on mother's agnostic religious views).

[8] *LeDoux v. LeDoux*, 452 N.W.2d 1, 5 (Neb. 1990) (upholding religious restrictions based on a state statute giving custodial parent exclusive control over religious upbringing and on evidence that child wet himself, had nightmares, and complained about being with his father); *Funk v. Ossman*, 724 P.2d 1247, 1250 (Ariz. App. 1986) (upholding religious restrictions based on state statute giving custodial parent exclusive control over religious upbringing and on child's physical symptoms of anxiety, manifested by his soiling his pants (encopresis)).

judicial inquiry to center on the emotional harm to the children." (Opp. at 21.) Respondent is missing the constitutional point. The ruling below fosters excessive entanglement because it mandates that the children – initially raised in the Reform Jewish tradition and with continuing exposure to their father's Christian beliefs – must now be reared exclusively as Orthodox Jews with no exposure whatsoever to the central tenets of their father's religion. Excessive entanglement also arises because the Massachusetts courts required that a government-appointed guardian ad litem explain to the children that "they are being raised in the way they are [*i.e.*, in the Orthodox Jewish faith] *because the Court believes it is in their best interest.*" (App. 27-28 (emphasis supplied).) Finally, by requiring the continuous tape recording, monitoring, and judicial review of the spiritual teachings of the father's church, the courts below have further entangled government excessively with religion. Contrary to Respondent's assertion, such taping of religious meetings – particularly when combined with the near-complete prohibition on taking the children to church or Sunday school – is not "the least intrusive means of limiting the Petitioner's religious rights." (Opp. at 21.)

C. The Ruling Below Violates Petitioner's Right to Free Exercise of Religion Under the First Amendment.

Respondent contends that the Probate Court's orders were "narrowly tailored and do not unduly burden the Petitioner's right to practice his religion; rather, the orders only limit the Petitioner from exposing the children to aspects of his religion that were causing affirmative harm to the children." (Opp. at 12.) This reasoning defies both logic and the record below. Jeffrey cannot know, in advance, whether a given religious idea will cause the children worry or distress. By prohibiting Jeffrey from exposing his children to any religious belief that might cause the children "significant emotional distress or worry about their mother or about themselves" (App. 25-26), the order effectively prevents him from

sharing *any* religious teachings with his children. A far less burdensome order would have required interfaith family counseling to help the children maintain meaningful relationships with *both* parents while experiencing the religious differences as a source of strength instead of distress. Equally important, this Court's independent review of the record below would establish that the children did not suffer any "affirmative harm" warranting such severe infringement of the Petitioner's First Amendment Rights.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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